(1)
Supreme Court, U.S.
FILED
04-1622 JUN 3 = 2005
No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2004

KEITH W. STROTHER,
CORPORAL,
UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Armed Forces

---

PETITION FOR A WRIT OF CERTIORARI

JASON S. GROVER
Lieutenant, JAGC, U.S. Navy

JOSEPH R. PERLAK
Lieutenant Colonel
U.S. Marine Corps

BRIAN L. MIZER
Lieutenant, JAGC, U.S. Naval Reserve
Counsel of Record
N.A.M.A.R.A.
716 Sicard St. S.E.
Suite 1000
Washington,D.C. 20374-5047
202/685-7396

Petitioner attended a farewell party for a fellow Marine at a private residence. While at the party, Petitioner observed a consensual group sex act in a bedroom of the residence. Petitioner's command investigated the orgy and elected to take no further action.

Five months later, Major Flexer, the new command staff judge advocate, reported to the command. Major Flexer reopened the investigation. He questioned the suspected orgy participants. He obtained telephone-monitoring equipment from the local police department in order to surreptitiously record the telephone calls of the orgy participants. He had a former assistant United States Attorney flown in from Georgia to assist him in his investigation. He procured grants of testimonial immunity for all of the orgy participants except one. He then prosecuted Petitioner at a general court-martial for watching the orgy over defense objection to his participation as prosecutor.

QUESTIONS PRESENTED

Can Petitioner, who observed a consensual group sex act in the bedroom of a private residence, be punished under the Uniform Code of Military Justice for observing a consensual group sex act in light of this Court's holding in *Lawrence v. Texas*, 539 U.S. 558 (2003)?

Should Major Flexer have been allowed to continue to serve, over defense objection, as the prosecutor in Petitioner's case after he initiated and conducted a police-style investigation into Petitioner's viewing of a consensual group sex act?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 2

PROCEEDINGS BELOW 7

REASONS FOR GRANTING THE PETITION 7

ARGUMENT 7

CONCLUSION 14

APPENDIX A 1*a*

APPENDIX B 20*a*

TABLE OF AUTHORITIES

United States Supreme Court Cases

Berger v. United States, 295 U.S. 78 (1935) 9
Lawrence v. Texas, 539 U.S. 558 (2003) 8
Marshall v. Jerrico, 446 U.S. 238 (1980) 9
Parker v. Levy, 417 U.S. 733, 758 (1974) 8
Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) 8

United States Court of Appeals for the Armed Forces

United States v. Jones, 44 M.J. 818 (C.M.A. 1969) 12
United States v. Strother, 60 M.J. 476 (C.A.A.F. 2005) .. 1,7

United States Constitution

U.S. CONST. amend. V 4

Federal Statutes

10 U.S.C. § 832 6
10 U.S.C. § 934 1
28 U.S.C. § 1259 (3) 1

Law Review Articles

Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 Wisc. L. Rev. 837 (2004) 10
Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 188 (1962) 7
Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 Temp. L. Rev. 887, 951 (1998) . 9

PETITION FOR A WRIT OF CERTIORARI

Corporal Keith W. Strother, United States Marine Corps, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces entered in his case on March 7, 2005.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces is published at 60 M.J. 476 (C.A.A.F. 2005). App. A, *infra,* at 1*a*. The opinion of the Navy-Marine Corps Court of Criminal Appeals, is unpublished at No. 200000050 (N-M. Ct. Crim. App. 2003). App. B, *infra* at 19*a*.

JURISDICTION

The Court of Appeals for the Armed Forces granted review of Petitioner's case and affirmed his conviction on March 7, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1259 (3).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution reads, in part:

> No person ... shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law....

STATUTORY PROVISIONS

10 U.S.C. § 934 states:

> "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

STATEMENT OF THE CASE

I. Statement of Facts

In March 1998, Corporal Keith Strother attended a farewell party for Sergeant Garrick Lampkin. Present at the party that evening were Sergeant Jason Woodruff, Corporal Darylion May, Corporal Alvin Kendrick, Corporal Cheryl Cahill, Mrs. Gwendolyn Biggerstaff and several other civilians and Marines. Mrs. Biggerstaff's husband was a Marine at the same command as Corporal Strother. Prior to the party, Corporal Cahill talked with Mrs. Biggerstaff about wanting to have an orgy with Sergeant Lampkin and Sergeant Woodruff.

At the party, Corporal Strother sat and talked with Mrs. Biggerstaff. Later that evening, Corporal Cahill began performing fellatio on Sergeant Lampkin in a spare bedroom while Sergeant Woodruff watched. She then had intercourse with Sergeant Lampkin while Sergeant Prince videotaped them. Corporal Cahill then orally sodomized Corporal Kendrick. At some point during the orgy, Mrs. Biggerstaff went looking for Corporal Cahill. When she opened the door

to the bedroom she saw Corporal Cahill having sexual intercourse with an unknown Marine. Corporal Cahill noticed Mrs. Biggerstaff in the doorway and asked Mrs. Biggerstaff if she was mad at her. Mrs. Biggerstaff went back into the living room and argued with Sergeant Lampkin.

Late into the evening, Corporal Cahill emerged from the bedroom with Sergeant Woodruff. Corporal Cahill told Mrs. Biggerstaff that she had "wore Woodruff out." Sergeant Woodruff passed out on the floor and Corporal Cahill left the party with Mrs. Biggerstaff. In the weeks following the orgy, Corporal Cahill bragged about the incident to Marines at her command.

In April 1998, rumors began circulating within the command about the incident and Marine Corps Reserve Support Command (MCRSC) Sergeant Major Willie J. Brock was directed to conduct an investigation. He interviewed numerous witnesses but determined that there was insufficient evidence to go forward with an investigation. At the conclusion of his investigation, he briefed the Deputy Commander, Colonel Hayes, the Chief of Staff, Colonel Bandy, and the Staff Judge Advocate, Major Miller. They all concurred with Sergeant Major Brock's recommendation that the matter should be dropped.

Five months later, in September 1998, Major Alain D. Flexer reported to MCRSC and replaced Major Miller as Staff Judge Advocate. For reasons unclear in the record, Major Flexer believed that a second investigation was required and he advised the Convening Authority as such in his capacity as Staff Judge Advocate. Major Flexer began questioning individuals in the command. He then contacted Lieutenant Colonel (LtCol) James R. Harper and inquired if he would be available to serve as an investigating officer in Petitioner's case. LtCol Harper, a drilling reservist, was an

attorney in private practice in Atlanta, Georgia. He was also a former Assistant United States Attorney.

Major Flexer continued his investigation by taking a sworn statement from Mrs. Gwendolyn Biggerstaff on October 1, 1998. Mrs. Biggerstaff stated that she observed an unknown Marine having sexual intercourse with Corporal Cahill as Sergeant Woodruff stood naked with two other Marines. She also stated that a civilian was videotaping the incident. Her statement made no mention of Corporal Strother with whom she had a conversation that evening.

Major Flexer prepared the necessary paperwork and LtCol Harper was appointed as investigating officer on October 2, 1998. LtCol Harper testified at trial, "I have talked with Major Flexer routinely, on a weekly basis, sometimes I've talked to him 2 and 3, 4 times a day trying to cover these-trying to cover some of our bases. We were not going to do-we were not going to go and bribe every witness we could and give deals to individuals unless we had to." Concerning the investigation, he testified, "We did it systematically, we did it methodically."

In October, LtCol Harper discussed with the Commanding Officer MCRSC and Major Flexer the possibility of recording phone conversations between Corporal Cahill and Petitioner. Following the conversation, LtCol Harper obtained tape recording equipment from a local police department. On October 14, 1998, LtCol Harper went to Corporal Cahill's home along with Staff Sergeant Foley. Staff Sergeant Foley was Major Flexer's Staff Judge Advocate Legal Clerk and Petitioner's Accuser.[1] Corporal Cahill agreed to call Petitioner on the phone and record the

---

[1] In the military context, the term accuser means a person who signs or swears to charges. *See* Article 1(9), UCMJ, 10 U.S.C. § 801(9) (2000).

conversations. She attempted to elicit incriminating statements from Corporal Strother. Three times she asked Petitioner if she should lie to LtCol Harper about the orgy having taken place. He replied that she should deny that the orgy happened. Staff Sergeant Foley transcribed the recordings.

On October 29, 1998, Major Flexer questioned Petitioner based on his solicited advice to Corporal Cahill that she deny the orgy. He invoked his right to remain silent. Corporal Strother was placed in pre-trial confinement that afternoon- seven months after the alleged incident took place. On October 31, 1998, LtCol Paul D. Wuebold conducted Petitioner's pretrial confinement hearing at Whiteman Air Force Base, Missouri. Major Flexer represented the command as command Staff Judge Advocate and LtCol Harper discussed the evidence that he and Major Flexer had gathered against Sergeant Strother. The reviewing officer found Corporal Strother to be a flight risk and that "future obstruction is a possibility." He remained in confinement until his trial, more than ninety days later.

On December 15, 1998, additional charges were referred. Major Flexer swore his legal clerk, Staff Sergeant Foley, to the charges. On the same day, LtCol Harper again questioned Mrs. Biggerstaff in an apparent effort to identify the, "two other Marines in the room." Based on her description of "two other Marines," the Staff Judge Advocate ordered nineteen Black male Marines, one of whom was Petitioner, to pose for individual photographs in their dress uniforms.

LtCol Harper then showed Mrs. Biggerstaff the "photographic lineup." After "30 or 40 minutes," she initialed Corporal Strother's photograph as one of the Marines present during the orgy. Mrs. Biggerstaff's December 15, 1998, statement is nearly identical to her October 1, 1998, statement taken by Major Flexer. But, at

the end of the statement, for the first time, some nine months after the incident, Mrs. Biggerstaff identified Corporal Strother as being present in the room during the orgy. She indicated that Petitioner was watching the orgy.

An Article 32, UCMJ hearing[2] was held for Petitioner the next day, December 16, 1998. The hearing officer was Major Kevin Chenail. Major Chenail was one of the Staff Judge Advocates for the same general court-martial convening authority that referred Petitioner's case to trial. At the hearing, Corporal Cahill expressed a desire to speak with an attorney before testifying. A recess was taken and Major Flexer privately advised Corporal Cahill as to whether she should assert her Article 31(b) rights and whether she wanted to close the proceedings. The record is silent on what advice he gave her. She returned ready to testify. At the hearing, and later at trial, Corporal Cahill claimed she could not remember the incident and testified that she was raped.

A second government witness, Corporal Jason Sifuentes, testified that he was not read his rights before giving a sworn statement on December 15, 1998. He wrote the statement in the presence of LtCol Harper and Major Flexer. Major Flexer took an unwarned statement from Corporal Sifuentes in October 1998. At the Article 32 hearing, when he expressed doubt as to his rights before testifying, Major Flexer was again allowed to privately consult with Corporal Sifuentes. The record is silent as to the advice he gave Corporal Sifuentes. He too returned ready to testify.

At trial, Major Flexer did not dispute the facts surrounding his involvement as staff judge advocate, command investigator, and trial counsel in the case.

---

[2] An investigation into the truth of the charges, the form of the charges, and a recommendation as to disposition. *See* Article 32, UCMJ, 10 U.S.C. § 832 (2000).

II. Proceedings Below

Petitioner was tried by a general court-martial composed of military judge alone which, contrary to his pleas, convicted him of one specification of an indecent act and one specification of endeavoring to impede an investigation, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (2000). The military judge sentenced Petitioner to confinement for ninety days, reduction to enlisted pay grade E-1, and a discharge from the naval service with a bad-conduct discharge.

The Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence. *United States v. Strother*, No. 200000050 (N-M. Ct. Crim. App. 2003). The Court of Appeals for the Armed Forces affirmed the lower court's decision, only addressing Major Flexer's role as investigator and prosecutor. *United States v. Strother*, 60 M.J. 476 (C.A.A.F. 2005). Although raised below, the Court of Appeals for the Armed Forces did not grant review of the issue of whether Petitioner had a constitutionally protected liberty interest in watching consensual groups sex acts in a private bedroom of a private residence.

REASONS FOR GRANTING THE PETITION

I.

The Petitioner has a Constitutionally Protected Liberty Interest in watching Consensual Group Sex Acts in the Private Bedroom of a Private Residence.

"[O]ur citizens in uniform may not be stripped of basic

rights simply because they have doffed their civilian clothes." Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 188 (1962). Among these basic rights is the right of free adults to engage in private sexual conduct. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992).

Corporal Strother was convicted of committing an "indecent act" by watching a consensual orgy in the private bedroom of a private residence. The orgy involved no minors. The orgy participants were not injured or coerced. The orgy did not take place in public nor did it involve prostitution. *See Lawrence*, 539 U.S. at 578.

Accordingly, the Due Process Clause gave the orgy participants the "full right to engage in their conduct without intervention of the government." *Lawrence*, 539 U.S. at 578. Petitioner simply observed this constitutionally protected activity. The United States Marine Corps has impermissibly infringed on the right of Petitioner to privately observe consensual group sex acts.

This Court has held that the unique nature of military society "may render permissible within the military that which would be constitutionally impermissible outside it." *Parker v. Levy*, 417 U.S. 733, 758 (1974). But this Court has never held that the military may infringe upon the substantive liberty interests guaranteed by the Due Process Clause. To the contrary, "[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places." *Lawrence*, 539 U.S. at 562. The United States Marine Corps should not be omnipresent in the bedrooms of its Marines and its attempts to regulate private consensual sexual relations is constitutionally impermissible absent some

showing of military necessity.

II.

It is the role of the Prosecutor to Check Police Excesses and Potentially Precipitous Actions of the Police. It was a Violation of the Due Process Clause for the lead Police Officer to later serve as the Sole Prosecutor in Petitioner's case.

The Due Process Clause requires some degree of neutrality on the part of prosecutors, though not to the same extent as judges. *Marshall v. Jerrico*, 446 U.S. 238, 249 (1980). A prosecutor:

> "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

Berger v. United States, 295 U.S. 78, 88 (1935). The prosecutor is a critical actor in the criminal justice system. His office, "is the first stop in the transition from street law enforcement to judicial controls and protections for the accused." Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 Temp. L. Rev. 887, 951 (1998).

It is the prosecutor who can, "check excesses and

potentially precipitous actions of the police, to serve as more neutral seekers of the truth, to consider and pursue hypotheses that may be inconsistent with suppositions adopted in the preliminary stages of the investigation, and to ensure meaningful implementation of the presumption of innocence." *Id.* And the criminal justice system, "historically has vested prosecutors with a great deal of discretion on the assumption that prosecutors are more removed from the facts of cases than police officers and therefore can exercise more independence." Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 Wisc. L. Rev. 837 (2004).

This case demonstrates the danger of letting the fox guard the henhouse. Major Flexer the prosecutor was in no position to check the excesses of Major Flexer the policeman. For example, Sergeant Lampkin, who had transferred to another command in California, declined, through counsel, to assist in Major Flexer's investigation. Unknown to his attorney, Major Flexer arranged for him to be flown back to Kansas City for several weeks of questioning by Major Flexer and LtCol Harper. He was never read his rights. At the conclusion of his questioning, he was given testimonial immunity and flown back to California. No other prosecutor, other than Major Flexer, would have condoned such actions by the police or relied on evidence so obtained.

Major Flexer's investigation left him in no position to exercise the prosecutorial discretion required of his office. The end result was that Petitioner, the least culpable of all of the parties present at the orgy, was prosecuted at a general court-martial-a forum reserved for the military's most serious offenses-while the more culpable orgy participants escaped prosecution altogether. Corporal Cahill, who instigated the orgy, was supposed to be administratively separated for alcohol abuse. After her cooperation with Major Flexer's

investigation, the command did not administratively separate her from the Marine Corps. Corporal Alvin Kendrick, who received oral sex from Corporal Cahill during the orgy, was given testimonial immunity. Sergeant Lampkin had sexual intercourse with Corporal Cahill and was also given testimonial immunity. Sergeant Lampkin and Corporal Cahill were also engaged in an adulterous relationship.[3] Sergeant Devon Morrison watched a videotape of the incident with Sergeant Prince and he was also given testimonial immunity.

The decision to single out Petitioner for prosecution is even more questionable in light of the fact that the record leaves substantial doubt as to whether Petitioner even watched the orgy. In fact, none of the orgy participants, even those testifying under grants of immunity, could say that Petitioner participated in or was even present during the orgy. Only Mrs. Biggerstaff, months later, and after repeated questioning by Major Flexer and LtCol Harper, and in her third written account of events that immediately followed a photographic lineup, would say that Corporal Strother watched the orgy.

Major Flexer created the photographic lineup that would ultimately lead to Mrs. Biggerstaff's identification of Petitioner as one of the Marines who watched an orgy. He personally took the statement of the government's only complaining witness, Mrs. Biggerstaff. Major Flexer also directed his subordinate, Staff Sergeant Foley, to record and transcribe Corporal Strother's phone conversations. Thus Major Flexer was personally responsible for and directly involved in the production and gathering of all of the

---

[3] A crime under the Uniform Code of Military Justice. *See* Article 134, UCMJ, 10 U.S.C. § 934 (2000); Manual for Courts-Martial ¶ 60, United States (1995 ed.).

evidence that was used against Petitioner.

Major Flexer, in his role as prosecutor, was in no position to objectively judge the legality of the photo lineup he created in his role as policeman and that ultimately led Mrs. Biggerstaff, in her third written statement, to identify Petitioner as having watched the orgy. Major Flexer, in his role as prosecutor, could not neutrally assess the merits of taking Petitioner to a general court-martial in a case where none of the orgy participants placed Petitioner in the bedroom and only Mrs. Biggerstaff, in her third written version of events, would say that Petitioner so much as watched the orgy. Major Flexer was in no position to judge the merits of prosecuting Petitioner for watching an orgy with the immunized testimony of the orgy particpants. Major Flexer, in his role as prosecutor, was in no position to judge the legality of the tape recordings he ordered or their later admissibility at trial.

"Human nature being what it is, the very fact of being called upon to condemn or countenance one's own workmanship cannot create a healthy outcome and less so when the outcome concerns the accused's denial of substantial rights." *United States v. Jones,* 44 C.M.R. 818, 824 (C.M.A. 1969).

And rather than being the first stop in the transition from street law enforcement to judicial controls and protections for an accused, Major Flexer punished Corporal Strother for asserting his rights. Corporal Strother was the only Marine who invoked his right to remain silent and subsequently refused to assist Major Flexer in his investigation. Petitioner was the only Marine placed in pretrial confinement. And he was the only Marine discharged from the naval service with a bad-conduct discharge.

There is ample evidence that Major Flexer, having served as policeman, did not appreciate his new function as

prosecutor. At a pre-trial investigation, Corporal Cahill expressed a desire to speak with an attorney before testifying. Major Flexer, aware that Corporal Cahill was represented by counsel, privately advised Corporal Cahill as to whether she should assert her Article 31(b) rights and whether she wanted to close the proceedings. She returned ready to testify.

A second government witness, Corporal Jason Sifuentes, testified that Major Flexer did not read him his rights before taking a sworn statement on December 15, 1998. Major Flexer also took an unwarned statement from Corporal Sifuentes in October 1998. At the Article 32 hearing, when he expressed doubt as to his rights before testifying, Major Flexer was again allowed to privately consult with Corporal Sifuentes. He too returned ready to testify.

Major Flexer's actions are those of an overzealous policeman with no regard for the rule of law or individual rights. His further service as the sole prosecutor in Petitioner's trial violated the Due Process Clause.

CONCLUSION

Wherefore, the Petitioner respectfully requests that the Supreme Court grant a writ of certiorari, and either summarily reverse or set the case for full briefing and oral argument. In the alternative, Petitioner requests that this Court remand this case and order the lower court to address the issue involving Petitioner's liberty interest.

Respectfully submitted,

BRIAN L. MIZER
Lieutenant, JAGC, U.S.
Naval Reserve
Counsel of Record

JASON S. GROVER
Lieutenant, JAGC, U.S. Navy

JOSEPH R. PERLAK
Lieutenant Colonel
U.S. Marine Corps

Navy-Marine Corps Appellate
Review Activity
716 Sicard St. S.E., Suite 1000
Washington, D.C. 20374- 5047
202/685-7396

APPENDIX

United States v. Strother, 60 M.J. 476 (C.A.A.F. 2005).

UNITED STATES, Appellee

v.

Keith W. STROTHER, Corporal
U.S. Marine Corps, Appellant

No. 03-0655

Crim. App. No. 200000050

United States Court of Appeals for the Armed Forces

Argued October 20, 2004

Decided March 7, 2005

EFFRON, J., delivered the opinion of the Court, in which GIERKE, C.J., CRAWFORD, BAKER, and ERDMANN, JJ., joined.

Counsel

For Appellant: Lieutenant Brian L. Mizer, JAGC, USNR (argued); Vaughan E. Taylor (on brief); Lieutenant Rebecca S. Snyder, JAGC, USNR.

For Appellee: Lieutenant Donald L. Palmer, JAGC, USNR

(argued); Colonel William K. Lietzau, USMC (on brief); Colonel M.E. Finnie, USMC, and Lieutenant Frank L. Gatto, JAGC, USN.

Military Judge: P. J. Straub

Judge EFFRON delivered the opinion of the Court.

At a general court-martial composed of a military judge sitting alone, Appellant was convicted, contrary to his pleas, of an indecent act and endeavoring to impede an investigation, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2000). He was sentenced to a bad-conduct discharge, confinement for 90 days, and reduction to E-1. The convening authority approved these results, and the Court of Criminal Appeals affirmed in an unpublished opinion.

On Appellant's petition, we granted review of the following issue:

> WHETHER THE LOWER COURT ERRED IN UPHOLDING THE MILITARY JUDGE'S DENIAL OF A DEFENSE MOTION TO REMOVE THE TRIAL COUNSEL, WHO HAD ACTED AS THE CASE INVESTIGATOR AND COMMAND LEGAL ADVISOR, WHILE IN THE POSITION OF STAFF JUDGE ADVOCATE.

For the reasons set forth below, we conclude that the military judge properly rejected the motion to disqualify the trial counsel, and we affirm.

I. BACKGROUND

A. THE PRELIMINARY INQUIRY

Appellant, a corporal, attended a farewell party for a sergeant in the unit, which was hosted by the departing member's roommate. Within weeks thereafter, rumors circulated within the command about inappropriate sexual activity at the party. The unit's command sergeant major conducted an investigation and concluded that the evidence was insufficient to warrant further action. He briefed the Deputy Commander, Chief of Staff, and Staff Judge Advocate, all of whom agreed with his assessment of the evidence.

Subsequently, Major (Maj) Flexer was detailed to serve as staff judge advocate for the command. At some point, the convening authority and Maj Flexer discussed the incident that had been the subject of the prior investigation. Maj Flexer conducted a number of interviews. He also inquired into the availability of Lieutenant Colonel (LtCol) Harper, a reserve officer and an attorney in civilian life, to conduct an inquiry. LtCol Harper was ordered to conduct a preliminary inquiry, and he discussed various aspects of the case with Maj Flexer, including procedural matters, substantive issues, and investigative options. As a result of information obtained during the preliminary inquiry, Appellant was confined, and Maj Flexer represented the command during Appellant's pretrial confinement hearing.

During the course of LtCol Harper's preliminary inquiry, a new Staff Judge Advocate, Colonel (Col) Nangle, was assigned to the command, and Maj Flexer assumed other legal duties.

B. THE ARTICLE 32 PRETRIAL INVESTIGATION

After receiving LtCol Harper's report, the convening authority ordered a formal pretrial investigation under Article

32, UCMJ, 10 U.S.C. § 832 (2000), and appointed Maj Chenail as the Article 32 Investigating Officer. The convening authority also designated Maj Flexer as the Counsel for the Government. The Article 32 Investigating Officer conducted a hearing, reviewed documentary evidence, and recommended referral of charges against Appellant to a general court-martial.

C. TRIAL PROCEEDINGS

The convening authority referred the charges to a general court-martial. Maj Flexer was detailed to serve as trial counsel. The defense moved to disqualify Maj Flexer because of his previous participation in the investigatory stages, citing Rule for Courts-Martial (R.C.M.) 502(d)(4), which states in pertinent part that:

> No person shall act as trial counsel . . . in any case in which that person is or has been:
>
> . . .
>
> (B) An investigating officer; . . .

See also Article 27(a)(2), UCMJ, 10 U.S.C. § 827(a)(2)(2000). The defense also cited Appellant's due process right to a fair trial. See U.S. Const. amend. V.

During argument on the motion, defense counsel asserted that "the rules say that if a person has been an investigator in the same case, he cannot be trial counsel." According to defense counsel, Maj Flexer violated the rules by taking statements, speaking to witnesses, arranging for witness travel, and participating in the determination to reopen the investigation. Defense counsel relied on the record of the Article 32 proceeding and presented testimony from LtCol Harper, the officer who conducted the preliminary inquiry,

concerning his interaction with trial counsel. The military judge denied the motion, concluding that the trial counsel's activity did not constitute any "overstepping" of the rules.

D. APPELLATE CONSIDERATION

Appellant contends in the present appeal that the military judge erred in denying the motion to disqualify trial counsel. According to Appellant, Maj Flexer was disqualified as a matter of due process because his pretrial activities made him an "interested party" who could not perform prosecutorial duties with the requisite degree of neutrality. In the alternative, Appellant contends that Maj Flexer acted as an "investigating officer" as that term is used in Article 27, thereby disqualifying him from serving as trial counsel. We review the military judge's ruling on a motion to disqualify counsel under an abuse of discretion standard. See United States v. Hamilton, 41 M.J. 22, 27 (C.M.A. 1994).

II. DUE PROCESS

Appellant asserts Maj Flexer was an "interested party" whose participation as a prosecutor violated Appellant's due process rights under the Supreme Court's decisions in Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987), and Marshall v. Jerrico, 446 U.S. 238 (1980). In support of his contention, Appellant notes that Maj Flexer was responsible for reviving a dormant investigation; he provided legal advice to commanders and investigators during an earlier phase of the case; he assisted in decisions leading to grants of immunity; this was his "first big case for the command"; the pressure to secure a conviction "must have been great," particularly in view of the grants of immunity to other persons whose culpability arguably was greater; and his "performance at trial likely would have been

documented on his fitness evaluation reports."

A. DISQUALIFICATION OF A PROSECUTOR AS AN "INTERESTED PARTY"

A prosecutor will be disqualified as an "interested party" if the prosecutor has a financial or improper personal stake in the outcome of the proceeding. The Supreme Court in Young addressed the propriety of appointing a private party's lawyer as the prosecuting attorney in a related contempt proceeding, and held that "the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations of that order." 481 U.S. at 790.

The Court emphasized that a prosecuting attorney:

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.

Id. at 803 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). The Court then noted that the distinctive role of the prosecutor has been expressly recognized in the American Bar Association's Model Code of Professional Responsibility, Canon 7, Ethical Consideration 7-13 (1982). See also Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (2004).

The Court discussed the conflict of interest provisions applicable to Department of Justice attorneys, including the

prohibition against simultaneously representing the Government and a private party having a financial interest that could be affected by a contempt proceeding. Young, 481 U.S. at 803-04 (citations omitted). The Court determined that similar considerations should apply to a district court's appointment of a special prosecutor in a contempt proceeding. Id. at 805-09. The Court did not express a view as to whether the appointment constituted a violation of the due process rights of the parties to the contempt proceeding. Id. at 809-10, 814-15.

In Marshall v. Jerrico, the Supreme Court discussed prosecutorial disqualification in both judicial and administrative proceedings in the course of rejecting a due process challenge to an administrative procedure. 446 U.S. at 242-43, 248-50. Under the challenged procedure, the Department of Labor imposed civil penalties for certain unlawful labor practices, and used the proceeds to reimburse the Department for the costs of determining violations and assessing penalties. See id. at 239. The Jerrico company contended that the potential for reimbursement could distort the department's objectivity by creating an incentive for the assistant regional administrator to assert and assess penalties. Id. at 241. This procedure violated due process, Jerrico argued, citing the practices struck down in Tumey v. Ohio, 273 U.S. 510 (1927) (mayor's salary tied to fines adjudicated by the mayor in a judicial capacity), and Ward v. Village of Monroeville, 409 U.S. 57 (1972) (sums produced by mayor's court accounted for a substantial portion of the municipality's revenue). Jerrico, 446 U.S. at 241-42.

The Court rejected the due process argument. Id. at 243-44. The Court noted that Tumey and Ward both were based on the requirement for an adjudication by an impartial tribunal, whereas the functions performed by the assistant regional administrator "resemble those of a prosecutor more closely than those of a judge." Id. at 243. According to the

Court, the due process limitations on "officials performing judicial or quasi-judicial functions . . . are not applicable to those acting in a prosecutorial or plaintiff-like capacity." Id. at 248. The Court added:

> Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process . . . . Prosecutors need not be entirely neutral and detached[.] In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing . . . penalties.

Id. at 248-49 (citations and internal quotation marks omitted). The Court emphasized, however, that the differences between prosecutors and judges did not foreclose judicial review of prosecutorial activities:

> We do not suggest . . . that the Due Process Clause imposes no limits on the partisanship of . . . prosecutors. Prosecutors are also public officials; they too must serve the public interest. In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law.

Id. at 249 (citations omitted). After noting the significant burden of defending against a prosecution, the Court stated:

> A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions. But the strict requirements of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime.

Id. at 249-50 (citations omitted).

The Court reviewed the administrative process at issue and concluded that "the influence alleged to impose bias [was] exceptionally remote." Id. at 250. The Court observed that the regional administrator did not have a personal financial interest in the collection of penalties and that any institutional benefit to the organization from the exercise of prosecutorial discretion was dependent upon too many contingencies. Id. at 250-52. In reaching this conclusion, the Court declined to "say with precision what limits there might be on a financial or personal interest of one who performs a prosecutorial function . . . ." Id. at 250 (footnote omitted). The Court added: "In particular, we need not say whether different considerations might be held to apply if the alleged biasing influence contributed to prosecutions against particular persons, rather than to a general zealousness in the enforcement process." Id. at 250 n.12.

B. DISCUSSION -- DUE PROCESS

The factors cited by Appellant, summarized at the outset of Part II of this opinion, do not transform a prosecutor into an "interested party" who must be disqualified as a matter of due process. The Supreme Court, in Young and Ierrico, recognized that prosecutors are advisors and advocates for a party. Young, 481 U.S. at 802-03; Ierrico, 446 U.S. at 248-49. As such, they need not maintain the degree of neutrality required of judges.

In civilian society, prosecutors routinely provide advice and recommendations on the conduct of investigations, grants of immunity, and charging decisions. The fact that such decisions later may be challenged at trial or on appeal does not disqualify an attorney from serving as a prosecutor as a matter of due process. Likewise, a civilian prosecutor, whether elected or appointed, inevitably faces the pressure of his or her "first big case," as well as the pressure generated when advice provided in a pretrial setting comes under challenge at trial. Such pressures, which come with the territory inhabited by prosecuting attorneys, do not transform a prosecutor into an interested party. Military prosecutors, like their civilian counterparts, are obligated to deal with such pressures in the context of the prosecutor's responsibility to ensure both that the guilty not escape and that the innocent not suffer. See Young, 481 U.S. at 803.

Appellant also asserts that Maj Flexer had a conflict of interest because he did not respond to defense discovery requests in a manner that was timely or complete. The defense litigated the issue of discovery in connection with a motion to reopen the Article 32 investigation, which was denied by the military judge. The defense has not asserted on appeal that the military judge committed prejudicial error with respect to discovery. While it is possible that prosecutorial abuse of discovery in another case would be so

egregious as to demonstrate impermissible bias requiring disqualification as a matter of due process, see Ierrico, 446 U.S. at 250 n.12, this is not such a case. The interest of the trial counsel in the present case did not approach the type of conflict or bias that would have made him an "interested party" under Young and Ierrico.

III. STATUTORY DISQUALIFICATION

Appellant contends that even if Maj Flexer was not disqualified as a matter of due process, he should have been disqualified in the present case as an "investigating officer" prohibited from serving as a trial counsel under Article 27(a)(2). The statute provides in pertinent part that: "[n]o person who has acted as investigating officer, military judge, or court member in any case may act later as trial counsel . . . ." Id.

In support of his contention that Maj Flexer was a statutory "investigating officer" under Article 27, Appellant notes that Maj Flexer engaged in a variety of activities more characteristic of a police officer rather than a prosecutor. According to Appellant, these activities resulted in selective prosecution and evidence produced by use of questionable investigative techniques.

A. DEVELOPMENT OF THE "INVESTIGATING OFFICER" DISQUALIFICATION

The prohibition on an "investigating officer" serving as a prosecutor in courts-martial was first enacted in the 1948 legislation amending the Articles of War, popularly known as the Elston Act. Selective Service Act of 1948, Pub. L. No. 80-759, §§ 201-46, 62 Stat. 604, 627-44 (1948) [hereinafter Elston Act]. As originally proposed, the provision was

designed to ensure that the position of "investigating officer" would not be filled by a person having "the attitude of a prosecutor." See Hearings on H.R. 2575 to Amend the Articles of War before Subcomm. No 11, Legal, of the House Comm. on Armed Services, 80th Cong. 2036 (1947)(remarks of Rep. Charles H. Elston, Chairman, and Brigadier General Hubert D. Hoover, Assistant Judge Advocate General of the Army); H.R. Rep. No. 80-1034, at 2, 15, 18 (1947).

The Elston Act contained two pertinent provisions. The first provision, Article of War 11, stated that "no person who has acted as member, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act in the same case as a member of the prosecution . . . ." Elston Act § 208. The second provision, Article of War 46, stated that "[n]o charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made," and referred to the person conducting the impartial proceeding as "the investigating officer." Elston Act § 222.

In the aftermath of the 1948 legislation, the President promulgated the Manual for Courts-Martial (MCM), U.S. Army, in 1949 (1949 MCM). Paragraph 6 of the 1949 MCM, governing appointment of the trial judge advocate (as the prosecutor was then designated), mirrored the statutory disqualification of a person who had served as investigating officer in the same case. With respect to the appointment of a pretrial investigating officer under Article of War 46, paragraph 35a of the 1949 MCM provided: "Neither the accuser nor any officer who is expected to become a member of the prosecution or defense upon possible trial of the case will be designated as investigating officer."
Paragraph 41*a*, of the 1949 MCM, contained a parallel provision:

> The trial judge advocate must be fair and

> free from bias, prejudice, or hostility. If he has acted as a member of the court, defense counsel, assistant defense counsel, or investigating officer in any case he shall not subsequently act in the same case as trial judge advocate or assistant trial judge advocate.

Under these provisions, the term "investigating officer" in the Articles of War and the 1949 MCM referred to a specific statutory position, filled by a person required to conduct an impartial investigation prior to referral of a case to a general court-martial. Because the trial counsel, an advocate for a party, would have an institutional conflict, the statute and the 1949 MCM required the position to be filled by a person who would not prosecute the case as trial counsel.

The UCMJ, which replaced the Articles of War, as well as the Articles for the Government of the Navy, was enacted in 1950, and took effect in 1951. Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 107 (1950). The new legislation retained the pertinent provisions of the Articles of War without substantive change. Article 32 continued the requirement for a "thorough and impartial investigation" by an "investigating officer" prior to referral of charges to a general court-martial. Article 27(a) continued the limitation that "[n]o person who has acted as investigating officer . . . in any case shall act subsequently as trial counsel . . . in the same case." See H.R. Rep. No. 81-491, at 18-20 (1949); S. Rep. No. 81-486, at 15-16 (1949).

The 1951 edition of the MCM reflected the statutory prohibition against appointing an investigating officer as trial counsel and prohibited appointment of a person to serve as an Article 32 Investigating Officer if the person was expected to become a member of the prosecution. Manual for Courts-Martial, United States, paras. 6, 34 (1951 ed.)(1951 MCM).

The 1951 MCM added an expanded definition of the term "investigating officer" for purposes of various disqualifications, including disqualification of trial counsel. Id. at para. 64. The new definition included: (1) Article 32 investigating officers; and (2) "any other person who, as counsel for, or a member of, a court of inquiry, or as an investigating officer or otherwise, has conducted a personal investigation of a general matter involving the particular offense." Id. The 1951 MCM restricted the reach of the new definition of "investigating officer" by providing that the definition would not disqualify "a person who, in the performance of his duties as counsel, has conducted an investigation of a particular offense or a closely related offense with a view towards prosecuting or defending it before a court-martial," except in circumstances addressed in other specified portions of the 1951 MCM. Id.

Our Court considered whether trial counsel should have been disqualified under these provisions in several cases arising in the years immediately following promulgation of the 1951 MCM. United States v. Lee concluded that an officer's informal investigation prior to preferral of charges did not disqualify that officer from serving as trial counsel in a special court-martial. 1 C.M.A. 212, 218, 2 C.M.R. 118, 124 (1952). Lee noted that there was a "distinctly arguable" interpretation of the applicable statutes under which the disqualification of an "investigating officer" only applied to an Article 32 investigating officer, but concluded that it was not necessary to rely on the statutes because paragraph 64 of the 1951 MCM employed a "broader view" of the term. Id. at 215, 2 C.M.R. at 121. The opinion concluded that an informal investigation conducted to determine whether the facts warranted preferral of charges did not transform counsel into an "investigating officer" for purposes of the Code or the broader requirements of the 1951 MCM. Id. at 218, 2 C.M.R. at 124. Accord United States v. Stringer, 4 C.M.A.

494, 16 C.M.R. 68 (1954); cf. United States v. DeAngelis, 3 C.M.A. 298, 305, 12 C.M.R. 54, 61 (1953) (a staff judge advocate's interactions with investigators, in terms of consultation and advice, did not transform the judge advocate into an "investigating officer"). See also R.C.M. 303 (preliminary inquiry into reported offenses). DeAngelis emphasized the critical role of judge advocates in the administration of military justice and discipline, adding that "it would be incongruous in the extreme were we to assume that [a judge advocate] is unable to function at all unless and until charges have been preferred and investigated." 3 C.M.A. at 305, 12 C.M.R. at 61. The opinion added that participation by lawyers in pretrial matters helps to "minimize[] the risk of error arising from faulty pretrial investigations" and in reducing the number of "ill-founded charges against those subject to military law." Id., 12 C.M.R. at 61.

Subsequent to these decisions, the pertinent provisions in the 1951 MCM were retained, without substantial change, when a revised edition of the MCM was issued in 1969. Manual for Courts-Martial, United States, paras. 6a, 34a, 64 (rev. ed. 1969). The MCM was restructured completely in 1984 to adopt a rule-based format, separating binding requirements from non-binding guidance. See Manual for Courts-Martial, United States (2002 ed.)(2002 MCM), App. 21, Analysis of Rules for Courts-Martial at A21-1 to A21-3 (history and composition of the 1984 MCM). The 1984 MCM adopted new rules regarding the term "investigating officer" as well as disqualification of trial counsel. These new rules remain in effect in the current edition of the MCM, the 2002 MCM.

In contrast to the pre-1984 editions of the MCM, the 2002 MCM does not contain a general definition of the term "investigating officer." Instead, it uses the term "investigating officer" in connection with specific rules.

R.C.M. 405, for example, implements the formal pretrial investigation procedures required by Article 32. R.C.M. 405(d)(1) uses the term "investigating officer" to describe the officer appointed under the rule to conduct the investigation. The same provision also provides expressly that "[t]he investigating officer is disqualified to act later in the same case in any other capacity." Id.

R.C.M. 912 governs challenges of panel members for cause. Under R.C.M. 912(f)(1)(F), a challenge for cause must be granted if the panel member "[h]as been an investigating officer as to any offense charged." The rule also includes a rule-specific definition applicable to challenges of panel members for cause:

> For purposes of this rule, "investigating officer" includes any person who has investigated charges under R.C.M. 405 [a formal Article 32 investigation] and any person who as counsel for a member of a court of inquiry, or otherwise personally has conducted an investigation of the general matter involving the offenses charged.

R.C.M. 912(i)(3).

By contrast, the rule governing qualification of counsel simply notes in pertinent part that a person may not act as trial counsel or assistant trial counsel "in any case in which that person is or has been . . . [a]n investigating officer . . . ." R.C.M. 502(d)(4). The procedure for disqualification of counsel does not refer to specific criteria, but instead notes generally that "[i]f it appears that any counsel may be disqualified, the military judge shall decide the matter and take appropriate action." R.C.M. 901(d)(3).

In summary, the initial prohibition against an investigating officer serving as trial counsel, which was implemented in

the 1949 MCM, used the term "investigating officer" to describe the officer required to conduct an "impartial" investigation prior to referral of charges to a general court-martial -- the predecessor of today's Article 32 officer. The 1951 MCM provided an expanded definition that expressly included persons other than the Article 32 investigating officer. Our Court in Lee focused on the fact that the definition in the 1951 MCM was broader than the statutory term. 1 C.M.A. at 215, 2 C.M.R. at 121. The President, in the 1951 MCM, exercised his authority to set forth in the MCM broader rights than those established under the UCMJ. See, e.g., United States v. Davis, 47 M.J. 484, 486 (C.M.A. 1998)(noting the authority of the President to do so unless such action would clearly contradict the express language of the UCMJ).

Having established, in paragraph 64 of the 1951 MCM, a broader definition of "investigating officer" than required by the UCMJ, the President was free in 1984 to take a more narrowly tailored approach, so long as the MCM did not set forth a provision contrary to or inconsistent with the UCMJ. See Article 36, UCMJ, 10 U.S.C. § 836 (2000). We note that the elimination or tailoring of a provision from the MCM does not necessarily mean that the text must be interpreted in its narrowest light, particularly if a broader interpretation is supported by judicial interpretation of the UCMJ, military custom, tradition, or parallel civilian practice. In the present case, however, those factors are not present. For purposes of disqualification of counsel, the President has narrowed the term "investigating officer" to its original usage – the disqualification of the officer who conducted the "impartial" investigation under the predecessor to Article 32 -- and we conclude that there is no basis in law to impose a broader judicial construction. We also note that that this appeal does not require us to address the question of whether there otherwise might be grounds for disqualifying trial counsel

who, in the same case, served previously as a hearing officer under a service-specific regulation requiring a degree of neutrality similar to that of an "impartial" Article 32 officer. See United States v. Mann, 50 M.J. 689, 702 (A.F. Ct. Crim. App. 1999)(noting possible distinction for circumstances involving trial counsel's prior participation in a case in a quasi-judicial role).

In the case before us, trial counsel did not serve as the Article 32 investigating officer, and Appellant has not demonstrated that trial counsel's activities so departed from the normal role of a prosecutor as to make him a de facto Article 32 "investigating officer." Cf. United States v. Payne, 3 M.J. 354 (C.M.A. 1977) (impropriety of Article 32 officer receiving ex parte advice from trial counsel). Appellant, at trial, did not present testimony from either the Article 32 officer or the trial counsel. In the absence of such testimony, and under the circumstances of this case, we decline to treat Appellant's speculation as to the nature of the interaction between trial counsel and the Article 32 officer as sufficient to demonstrate that trial counsel became a de facto Article 32 investigating officer. In that regard, it is also noteworthy that Appellant challenged the validity of the Article 32 investigation on a variety of grounds, including the actions of trial counsel, without calling either the Article 32 officer or trial counsel as witnesses. The military judge denied the defense motion, and Appellant has not challenged that ruling on appeal. Likewise, although Appellant attempts to raise discovery violations and selective prosecution as evidence of trial counsel's improper role as an investigating officer, Appellant has not assigned issues of law in the present case contending that there was error, much less prejudicial error, with respect to discovery or selective prosecution.

IV. Conclusion

Appellant has not demonstrated that trial counsel was disqualified as a matter of due process or as a result of prior service in the same case as a statutory "investigating officer." The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

***United States v. Strother*, No. 200000050 (N-M Ct.Crim. App. 2003)**

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

JOHN T. OLIVER, C.J. VILLEMEZ,
J.D. HARTY

UNITED STATES
v.
Keith W. STROTHER
Corporal (E-4), U.S. Marine Corps Reserve

NMCM 200000050 Decided 30 June 2003

Sentence adjudged 27 January 1999. Military Judge: P.J. Straub. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Marine Forces Reserve, New Orleans, LA.

LT M. ERIC EVERSOLE,
JAGC, USNR, Appellate Defense Counsel

LT C.J. GRAMICCIONI, JAGC, USNR,

Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

Contrary to his pleas, Appellant was convicted at a general court-martial before a military judge alone of obstructing justice and committing an indecent act with another, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. §934. His sentence included a bad conduct discharge, confinement for 90 days, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

We have carefully reviewed the record of trial, Appellant's assignments of error,[1] and the Government's

---

I. THE GOVERNMENT FAILED TO OFFER FACTUALLY AND LEGALLY SUFFICIENT EVIDENCE TO PROVE THAT APPELLANT INDECENTLY ACTED WITH ANOTHER.

II. THE MILITARY JUDGE ERRED BY NOT DISQUALIFYING THE TRIAL COUNSEL AFTER HE ACTED AS PRE-TRIAL INVESTIGATOR.

III. THE MILITARY JUDGE ERRED WHEN HE FAILED TO FIND A VIOLATION OF APPELLENT'S RIGHT TO A SPEEDY TRIAL.

IV. THE SENTENCE, INCLUDING A BAD-CONDUCT DISCHARGE, WAS INAPPROPRIATELY SEVERE GIVEN THE NATURE OF THE OFFENSES AND THE CHARACTER OF THE OFFENDER.

V. THIS COURT CANNOT PROPERLY REVIEW THIS CASE BECAUSE THE RECORD OF TRIAL

response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of Appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Statement of Facts

Appellant was stationed at the Marine Corps Reserve Support Command, Kansas City, Missouri. Record at 44. On 12 March 1998, a farewell party was held for a command member, Sergeant (Sgt) Lampkin, at an apartment in the Kansas City area. *Id.* at 44, 85. The party was attended mostly by active duty Marines from the command and some civilians. *Id.* at 45, 87. One of the attendees was a Corporal (Cpl) Cheryl Cahill. *Id.* at 45. Cpl Cahill had been dating Sgt Lampkin. *Id.* at 47, 85. During the party, Cpl Cahill went into a bedroom and engaged in various sexual acts with multiple persons. Naked people, including Marines and at least one civilian, watched while "waiting [their] turn,"[2] and videotaped the sex acts. *Id.* at 88-89, 113-114, 118.

Information about the party circulated around the command and Sergeant Major Brock, who recommended no further action, conducted a preliminary inquiry in April or May 1998. *Id.* at 12. That recommendation apparently was not followed, because Major (Maj) Alain Flexer, USMCR, then acting as staff judge advocate, interviewed witnesses

---

IS NOT VERBATIM (Supplemental Assignment of Error filed 26 November 2001).

[2] We are aware that "waiting his turn" speculates as to each naked Marine's purpose for being naked next to the bed upon which two other Marines are engaged in sexual intercourse. *See* Record at 89. We are, however, satisfied under these circumstances the speculation is well-founded.

and took statements as late as 1 October 1998. *Id.* at 11; Defense Exhibit A. Lieutenant Colonel (LtCol) Harper, USMCR, was subsequently appointed as preliminary investigating officer, Record at 13, and on 3 December 1998, Maj Chenail, USMC, was appointed as the Article 32, UCMJ, investigating officer. Appellate Exhibit III.

On 29 October 1998, Appellant was placed in pretrial confinement. Charge Sheet; Appellate Exhibit VII, Attachment A as stipulated to at Record at 15-16, 35-36. Appellant remained in pretrial confinement up to the date of trial on 25 January 1999, which was his 90th day of confinement. Record at 145.

Sufficiency of Evidence

Appellant contends that the evidence against him is both factually and legally insufficient to support the finding of guilty for the charge of indecent act with another (Specification 1 of the Additional Charge).

In *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987), our superior Court set forth the appellate standard for Courts of Criminal Appeals to review the legal and factual sufficiency of the evidence as to a finding of guilty on a charge.

> The test for [legal sufficiency] is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the

> members of the [Court of Criminal Appeals] are themselves convinced of the accused's guilt beyond a reasonable doubt.

Id. at 324-25; *accord United States v. Valentin-Nieves*, 57 M.J. 691, 695 (N.M.Ct.Crim.App. 2002). In meeting the test for factual sufficiency, we need not find the evidence free of conflict to be convinced of an appellant's guilt beyond a reasonable doubt; in other words, we may believe the testimony of one witness over the conflicting testimony of another. *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999).

There are but three elements for the offense of indecent acts with another: that the accused committed a certain wrongful act with a certain person; that the act was indecent; and that under the circumstances, the conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 90(b). "'Indecent'" signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." *Id.* at ¶ 90(c).

Appellant asserts that multiple witnesses testified that Appellant was not in the bedroom where the sex acts were performed. While it may be true that Cpl Cahill did not see Appellant in the bedroom, Record at 44-84, her attention was otherwise occupied. While she did not remember anyone other than Sgt Woodruff and Sgt Lampkin being in the bedroom, *id.* at 47-48, others were obviously in and out of that bedroom engaging in sexual acts and videotaping. Sgt Ian Morrison, USMCR, testified that he watched a videotape of Cpl Cahill engaged in sexual acts with Sgt Woodruff, Sgt Lampkin, and Cpl Kendrick, with additional unidentified

naked male bodies in the room. *Id.* at 113-16. Cpl Alvin Kendrick, USMCR, testified that he engaged in a sex act with Cpl Cahill, saw Sgt Prince videotaping sex acts, and saw a man named "Will" having sex with Cpl Cahill. *Id.* at 116-20. Clearly, Cpl Cahill's not seeing Appellant in the bedroom does not equate to Appellant never being in the bedroom. Cpl Darylion May, USMCR, testified that he was at the party for 30 minutes but did not go into the bedroom although he heard Cpl Cahill's voice and other unidentified voices coming from the bedroom. *Id.* at 101-11. While he did not hear Appellant, that does not discount other testimony that Appellant was in the bedroom.

Ms. Gwendolyn Biggerstaff, a civilian, testified that she walked into the bedroom and saw Cpl Cahill having sex with Sgt Woodruff, three naked Marines watching plus another person videotaping the sex. She stated that one of those naked Marines "waiting his turn" was Appellant. *Id.* at 88-89. She further testified that the Marines were coming and going from the bedroom, including Appellant. *Id.* at 89. Appellant claims Mrs. Biggerstaff's testimony is not credible, because she identified Appellant from a photo lineup 9 months after the March 1998 incident and because her two prior written statements contradicted her testimony as to who she saw having sex with Cpl Cahill. The Government counters that Ms. Biggerstaff is believable because she was not intoxicated, had seen and talked to Appellant at the party, and had no motive to fabricate.

In our review of the record, we believe that the Government's position is more compelling. Ms. Biggerstaff's observations were confirmed by other witnesses. While she could not explain the difference between her written statements and her testimony as it pertained to Sgt Woodruff, *Id.* at 100, that inconsistency does not discount any of her testimony concerning Appellant, who was clearly at the party. He was observed not only by Ms. Biggerstaff, but he was

observed by Cpl Cahill, and Cpl May as well, *Id.* at 45, 103, 106. When Cpl Cahill told Appellant she informed the investigator that Appellant was at the party, Appellant did not disagree, however, he did say that he would claim that he was never at the party. Prosecution Exhibit 4. This, however, only means that we are convinced beyond a reasonable doubt that Appellant was in the bedroom during the sex acts, watched the sex acts with multiple others including Marines, was "waiting his turn," and that he was naked at the time. While factual sufficiency is clear, we must address whether these facts amount to indecent acts.

The offense of indecent acts with another does not require touching. *United States v. McDaniel*, 39 M.J. 173 (C.M.A. 1994); *United States v. Thomas*, 25 M.J. 75 (C.M.A. 1987). It does, however, require the act be "done in conjunction or participating with another person." *Thomas*, 25 M.J. at 76. Here, Appellant, in conjunction with other named and naked Marines, participated in watching and videotaping sexual acts between an intoxicated female Marine E-4 and multiple male Marines in pay grades E-4 and E-5. We do not believe for a moment that Appellant's participation in this "grossly vulgar, obscene, and repugnant" activity was limited to his passive naked presence in the bedroom. Considering the evidence in the light most favorable to the prosecution, we find that a reasonable fact-finder could find all the elements of indecent acts with another, beyond a reasonable doubt. This assignment of error is without merit.

Disqualification of Trial Counsel

Appellant next argues the military judge committed prejudicial error by failing to disqualify the trial counsel, Maj Flexer, USMCR. Appellant contends Maj Flexer served as an investigating officer in the case which served to disqualify him from subsequently serving as trial counsel. The

Government's position is Maj Flexer was not an "investigating officer" and therefore not disqualified; furthermore, Appellant suffered no prejudice as the result of his role before or during the trial.

Appellant cites RULE FOR COURTS-MARTIAL 901(d)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) for authority. Appellant's Brief and Assignment of Errors of 10 Aug 2001 at 7. At trial, Appellant relied on R.C.M. 502(d)(4). Appellate Exhibit V. The military judge denied the motion finding no violation of R.C.M. 502(d)(4). Record at 39-40. R.C.M. 901(d)(3) deals with the disqualification of counsel. The discussion to that section states:

> Counsel may be disqualified because of . . . Duties or actions which are inconsistent with the role of counsel. See R.C.M. 502(d) concerning qualifications of counsel
>
> . . . .
>
> Disqualification of counsel is not a jurisdictional defect; such error must be tested for prejudice.[3]

R.C.M. 502(d)(4) states that "[n]o person shall act as trial counsel . . . in any case in which that person is or has been: . . . (B) An investigating officer." This section is based upon Article 27(a)(2), UCMJ, 10 U.S.C. §827(a)(2), which states "[n]o person who has acted as investigating officer, military judge, or court member in any case may later act as trial counsel . . . in the same case." See MCM, App. 21, at A21-27. Each of the positions listed in Article 27, UCMJ, are positions that require detailing by a higher authority. R.C.M.

---

[3] Certainly if erroneously disqualifying counsel is not jurisdictional, erroneously failing to disqualify counsel is not jurisdictional.

405(d)(1)[4] states "[t]he commander directing an investigation under this rule shall detail a commissioned officer, who shall conduct the investigation and make a report of conclusions and recommendations. The investigating officer is disqualified to act later in the same case in any other capacity." (Emphasis added). "Investigating officer" for R.C.M. 502(d)(4) and R.C.M. 901(d)(3) purposes appears to mean a person who has been detailed by a convening authority to serve as "investigating officer" to conduct a hearing pursuant to Article 32, UCMJ.

The military judge considered the testimony of LtCol Harper in reaching his essential findings and conclusions of law. Record at 10-15, 39-40. The military judge determined

> Major Flexer is the SJA for the Marine Corps Reserve Support Command. He indicated in the Article 32 that he was acting solely as trial counsel and Colonel Nagle, SJA for Marine Corps Forces Reserve Command, the convening authority, would act as an SJA in this regard . . . . Major Flexer talked to several of the witnesses prior to recommending an investigation in the charges to be presented. He arranged for Lieutenant Colonel Harper to be the investigating officer in the September '98 time frame. Major Flexer did take a sworn statement from Mrs. Biggerstaff on 1 October '98. Lieutenant Colonel Harper was detailed to begin the inquiry on 2 October 98 . . . (emphasis added).

---

[4] R.C.M. 405 implements Article 32, UCMJ. See MCM, App. 21, at A21-23

Id. at 39. We also note from the record that the Article 32, UCMJ, investigation was conducted by Maj Chenail, USMC. Appellate Exhibit III.

We will accept the military judge's findings of fact unless they are clearly erroneous. *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985). The standard of review on the military judge's decision concerning disqualification of counsel is abuse of discretion. *United States v. Hamilton*, 41 M.J. 22, 27 (C.M.A. 1994). Defects in the qualification of trial counsel are tested for prejudice. *Wright v. United States*, 2 M.J. 9 (C.M.A. 1976). The military judge's findings are fully-supported by the record and are accepted. Art. 66(c), UCMJ.

The military judge did not abuse his discretion in ruling Maj Flexer was not disqualified from serving as trial counsel. Maj Flexer was not an "investigating officer" as contemplated by statutes and rules governing disqualification of trial counsel. Finally, Appellant suffered no prejudice as a result of Maj Flexer's service as trial counsel, because there is no evidence that Maj Flexer had access to witnesses or information not provided to the defense. *See United States v. Mann*, 50 M.J. 689 (A.F.Ct.Crim.App. 1999). This assignment of error is without merit.

Article 10, UCMJ, Speedy Trial

Appellant contends the military judge abused his discretion by denying his right to speedy trial, when it took 90 days to bring him to trial. Appellant raised this issue by pretrial motion citing only to R.C.M. 707. Appellate Exhibit VI. The military judge denied the motion and entered findings of fact and conclusions of law under R.C.M. 707 and Article 10, UCMJ. Record at 40. On appeal, Appellant does not state whether he is addressing his R.C.M. 707 or Article

10, UCMJ, right to speedy trial. The Government's response is limited to Appellant's Article 10, UCMJ speedy trial right.

Although Appellant argues the military judge abused his discretion, abuse of discretion is not the appellate standard of review. On appeal we must determine *de novo* whether the Government "has used reasonable diligence in discharging its duty under Article 10 to take immediate steps to try an accused . . ." *United States v. Cooper*, 58 M.J. 54, 59 (C.A.A.F. 2003). In doing so, we must consider the factors enumerated in *Barker v. Wingo*, 407 U.S. 514 (1972). *Cooper*, 58 M.J. at 56; *see United States v. Birge*, 52 M.J. 209 (C.A.A.F. 1999)(holding the appropriate analysis of Article 10, UCMJ, issues involves consideration of the *Barker v. Wingo* factors).

Here, as in *Cooper*, the military judge did not address the *Barker v. Wingo* factors. Record at 40-41. We apply those factors now based upon the stipulated facts at trial, Appellate Exhibit VII, Attachment A as stipulated to at Record at 15-16, 35-36, and find: (1) Appellant did not submit a demand for a speedy trial but did submit requests for release from pretrial confinement on 1 and 23 December 1998 (Letter from Trial Defense Counsel to Commanding Officer, Marine Corps Reserve Support Command of 1 December 1998; Letter from Trial Defense Counsel to Commanding Officer, Marine Corps Reserve Support Command of 23 December 1998); (2) Appellant filed a motion for appropriate relief due to a violation of R.C.M. 707 on approximately 24 January 1999 (Appellate Exhibit VI); (3) Appellant did not enter into a pretrial agreement; (4) Appellant received credit for his pretrial confinement on his sentence (Record at 145-46); (5) there is no evidence of willful or malicious conduct on the part of the Government to create the delay; and (6) Appellant suffered no prejudice to the preparation of his case as a result of the delay.

Having carefully examined the handling of this case from

beginning to end, we are fully-satisfied that the Government acted with "reasonable diligence" throughout this prosecution in regard to all offenses alleged. *See United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993); *United States v. Tibbs*, 15 U.S.C.M.A. 350, 353, 35 C.M.R. 322, 325 (1965). As noted by the military judge, R.C.M 707 imposes a 120-day speedy trial clock. Because Appellant was brought to trial on day 90, there is no violation of R.C.M. 707. Under either theory, this assigned error is without merit.

Inappropriately Severe Sentence

Appellant next contends that a bad conduct discharge is inappropriately severe and fails to balance the nature of the offense with his years of credible service. He asks that we reassess his sentence by disapproving the bad conduct discharge. We decline to do so.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 10 C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959)).

The offenses committed by Appellant were serious and deserving of serious punishment. He participated in an indecent act with others and then obstructed the investigation of numerous persons involved in those acts. Based upon the entire record, including Appellant's military record, good character testimony, and his unsworn statement, we find that Appellant's sentence is not inappropriately severe. Art. 66(c), UCMJ.

Verbatim Record of Trial

For his final assignment of error, raised as a supplemental assignment of error, Appellant assets that this Court cannot conduct a full review of this case and Appellate Defense Counsel cannot properly represent Appellant because the photo lineup used by Ms. Biggerstaff to identify Appellant is not in the record of trial. The photo lineup was admitted as an exhibit during the Article 32, UCMJ, investigation. The record of that investigation was admitted at trial as Appellate Exhibit III. The photo lineup should have been admitted as part of Appellate Exhibit III.

On 11 March 2002, the Government filed a motion pursuant to N.M.CT.CRIM.APP. RULE 4-8.3 to attach the missing exhibit and supporting affidavit to the record of trial. That motion was granted on 19 March 2002. This assignment of error is moot.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved on review below.

For the Court

R.H. TROIDL
Clerk of Court